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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

VIA CERTIFIED MAIL--
RETURN RECEIPT REQUESTED

C-29A

August 30, 1996

Mark R. Sargis, Esq.
Mauck Bellande Cheely
19 South LaSalle Street
Suite 1203
Chicago, Illinois 60603

Re: Conservation Chemical Company of Illinois, Inc., Gary, Indiana; Response to Comments on *De Minimis* Settlement.

Dear Mr. Sargis:

Enclosed, please find a copy of the U.S. Environmental Protection Agency's Responsiveness Summary relating to the *de minimis* settlement for the Conservation Chemical Company of Illinois, Inc. Site in Gary, Indiana ("CCCI Site" or "the Site"). The summary responds to your comments on the CCCI *de minimis* settlement that were submitted on July 12, 1996.

Please note that the Director, Superfund Division, U.S. Environmental Protection Agency, Region 5, determined that the comments do not disclose facts or considerations which would indicate that the proposed *de minimis* settlement for the CCCI Site was inappropriate, improper, or inadequate. Accordingly, the CCCI *de minimis* settlement was not modified or withdrawn because of the comments. The Agency, however, made one limited change to the text provisions of the *de minimis* Consent Order, as compared to the February 1996 draft; a sentence was added to Section 1, Paragraph 1, of the Consent Order to clarify that U.S.

EPA's authority for this settlement was redelgated from the Regional Administrator to the Director, Superfund Division, EPA, Region 5, on May 2, 1996. Appendix D of the Consent Order was revised to reflect the final settlement amounts after the application of all verified credits. On August 12, 1996, the Director approved the CCCI *de minimis* settlement as a final matter. A copy of the Director's Declaration, approving the CCCI *de minimis* settlement is attached for your information.

Sincerely,

Cynthia N. Kawakami
Associate Regional Counsel

Enclosures

CONSERVATION CHEMICAL COMPANY OF ILLINOIS SITE
GARY, INDIANA
***DE MINIMIS* ADMINISTRATIVE ORDER ON CONSENT**
DOCKET NO. V-W-96-C-337

RESPONSIVENESS SUMMARY

Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. § 9622(i), requires that U.S. EPA (1) publish notice of a proposed *de minimis* administrative order on consent in the Federal Register; (2) provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement for a 30 day period; and (3) consider any comments filed under Section 122(i)(2) of CERCLA in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.

The following is a recapitulation of comments received and a summary of U.S. EPA's response to those comments. Similar comments were aggregated to avoid redundancy. The identity of the commentor(s) follows each comment in parentheses. Joint comments were received from counsel for the non-*de minimis* Potentially Responsible Parties (PRPs) as follows: Gary Steel Supply Co., Bethlehem Steel Corporation, LaSalle Steel Company, AT&T/Lucent Technologies (for Western Electric and Teletype), Allied Signal, Inc. (For Universal Oil Products), K.A. Steel Chemicals, Inc., UNOCAL Corporation (for Union Oil Co. of California), Chicago Steel & Pickling Company, Trent Tube Incorporated, American Chain & Cable Co., Inc., and Navistar (for International Harvester) ("the joint commenting parties"). The joint commenting parties, who have been designated as non-*de minimis* PRPs by the Agency, reiterated and incorporated by reference the comments contained in attorney, Clifton Lake's May 2, 1995 letter to the Agency; that letter discussed certain concerns with an early draft Consent Order for the non-*de minimis* PRPs, as well as the concept of a *de minimis* settlement for the Conservation Chemical Company of Illinois Site ("the CCCI Site"

or "the Site").[1] The Agency's responses presented herein will respond only to those comments contained in Mr. Lake's letter that relate to the concept of a *de minimis* settlement for the Site. In addition to the joint comments mentioned above, counsel for non-*de minimis* PRP, K.A. Steel Chemicals ("KAS Chemicals"), submitted additional separate comments that will be addressed herein.

1. **Comment**

A *de minimis* settlement for this Site is inappropriate because U.S. EPA lacks sufficient information as to the eligible PRPs for such a settlement. The joint commenting parties, who identify themselves primarily as generators of acid and cyanide waste, indicate that a number of them had removed all of the acid and cyanide waste at the Site in an earlier phase of the removal action at this Site. The final phase of cleanup at the Site will allegedly be driven primarily by the presence of "organic compounds" and Polychlorinated Biphenyls ("PCBs"). Therefore, under the current circumstances, the joint commenting parties are now "minor" generators of the waste that is currently on-site, and any *de minimis* settlement that does not include the joint commenting parties as *de minimis* parties would be unfair. In addition, a *de minimis* settlement that includes smaller PRPs who are generators of "organic" wastes would also be unfair. (Comment submitted by the joint commenting parties).

U.S. EPA Response

Based upon its evaluation of the Site history, current circumstances, and the liability evidence regarding each PRP at this Site, it is U.S. EPA's position that it has correctly identified the proper *de minimis* parties at this Site, and has offered them an appropriate *de minimis* settlement. The 1994 site assessment revealed 12 non-empty tanks containing acids and solvents; a number of empty tanks with acid and caustic residue; a number of deteriorating drums containing acid, caustic and flammable liquids; a number of empty drums with acid and caustic residue, and cyanide solids; and soil contaminated with acid

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[1] Mr. Lake's May 1995 comments pre-dated the formal *de minimis* settlement offer for this Site that was sent to the *de minimis* PRPs on February 8, 1996.

wastes and chromium. While the site assessment also documented approximately 5000 cubic yards of PCB-contaminated soil and contaminated groundwater, the final phase of the removal action at the Site will be "driven" by the removal of acids, cyanide, caustics, flammables, and other hazardous substances, as opposed to the PCBs and contaminated groundwater. Indeed, the majority of the costs estimated for the final phase of cleanup at the Site (that were included in the total cost figure for the *de minimis* settlement), relate to response activities that address contaminated wastes other than PCB-contaminated waste and contaminated groundwater. In addition, as noted more completely in the Agency's response to Comment Number 3, contained herein, U.S. EPA reevaluated its initial position and determined that an Engineering Evaluation/Cost Analysis to more fully investigate long-term groundwater contamination and possible groundwater remedies would not be required for this Site; Mr. Lake was verbally informed of this determination in the summer of 1995. Therefore, the non-*de minimis* PRPs, as designated by the Agency, who are major generators of acids and cyanide are not, *de facto*, *de minimis* PRPs as claimed. Accordingly, the Agency has made an appropriate *de minimis* settlement offer in this case.

2. **Comment**

A *de minimis* settlement for this Site is inappropriate because U.S. EPA lacks sufficient information as to the site remedy costs at this point in time. (Comment submitted by the joint commenting parties).

U.S. EPA Response

U.S. EPA has gathered and evaluated a significant amount of information about the current conditions at the CCCI Site, which have provided the basis for the Agency's development of an appropriate cost estimate for the response activities in the final phase of this removal action at the Site. In 1994, U.S. EPA conducted a site assessment at the CCCI Site that documented the threats at the Site as discussed above. The Agency then determined that certain response activities, including the removal and proper disposal of acid wastes, caustics, cyanide, flammable liquids, acid- and chromium-contaminated soils, PCB-contaminated soils, and other hazardous substances would be appropriate for the final phase of the removal action at the Site. U.S. EPA evaluated the cost of these response activities

and estimated that the cost of the final phase of the removal action at the CCCI Site would be approximately $10,806,165. This cost figure was included as part of the total costs for the *de minimis* settlement.

3. Comment

A *de minimis* settlement for this Site is inappropriate because the amount and effect of the groundwater contamination at the Site are unknown, and a *de minimis* settlement, under such circumstances would be inappropriate and contrary to Agency guidance. (Comment submitted by the joint commenting parties).

U.S. EPA's Response

In 1994, U.S. EPA conducted geoprobe testing at the Site that detected groundwater contamination from hazardous substances, including trichloroethene, toluene, benzene, acetone, and xylenes at levels that were beyond appropriate federal limits. Based on these findings, U.S. EPA determined that the installation and operation of an interceptor trench with oil skimmers would be an appropriate response to the conditions at the site, and then estimated the costs of this portion of the response action. U.S. EPA had an adequate amount of information to determine the amount and effect of the groundwater contamination at the Site. Therefore, a *de minimis* settlement that included estimated costs for this response activity at the Site was appropriate.

The joint commenting parties indicated that U.S. EPA's RPM, Mike Gifford had verbally indicated at the November 1994 kickoff meeting that U.S. EPA had "no information" on the costs of a groundwater remedy, except that it would be in addition to the current cost estimate. It should be noted, however, that Mr. Gifford was not referring to the collection trench system that had already been projected for the Site, and was referring to a long-term groundwater remedy for the Site that had not yet been determined by the Agency. Moreover, in response to Mr. Lake's May 2, 1995 letter, the Agency reevaluated its position and decided that an Engineering Evaluation/Cost Analysis would not be a part of the response activities for this Site. Mr. Lake was verbally notified of this determination in the summer of 1995. Necessarily, the costs of an EE/CA were not factored into the total Site costs for the *de minimis* settlement.

4. **Comment**

A *de minimis* settlement is inappropriate for this Site because, at the present time, the harm at this Site is divisible, and joint and several liability no longer applies as all of the acids and cyanides were cleaned up in a prior phase of this removal action by some of the commenting non-*de minimis* PRPs who have identified themselves primarily as generators of acid and cyanide waste. (Comment submitted by the joint commenting parties).

U.S. EPA's Response

It is U.S. EPA's position that joint and several liability still applies at the CCCI Site and the *de minimis* settlement is appropriate because, as discussed above, the final phase of the removal action at the Site will be "driven" by the removal of acids, cyanide, caustics, and other hazardous substances, rather than just PCBs and "organics." See U.S. EPA's Responses to Comments Numbers 1 and 3. The joint commenting parties have identified themselves as generators of acids and cyanide, and, accordingly, are jointly and severally liable for the remaining cleanup activities at the Site. Therefore, the *de minimis* settlement is appropriate.

5. **Comment**

The *de minimis* PRPs are not liable for the PCBs at the Site, and, therefore, cleanup costs for the PCBs should not be included in any *de minimis* settlement. (Comment submitted by the joint commenting parties).

U.S. EPA's Response

Based on its review of the liability evidence, it is U.S. EPA's position that a variety of wastes disposed of at the CCCI Site, including, but not limited to waste oil, oil solutions, phenolic wastes, sludges, solvents, certain chemical strippers, etch solutions, and degreasers, likely contained PCBs that were released at the Site. Consequently, the Agency believes that those PRPs who disposed of such wastes at the Site are responsible, in part, for the cleanup of the PCBs found at the Site. Therefore, it was appropriate for U.S. EPA to include the costs of the PCBs in the *de minimis* settlement.

U.S. EPA also takes the position that all of the *de minimis* PRPs are liable under CERCLA for the contamination at the Site whether

it be from the PCBs or other hazardous substances found at the Site, and the *de minimis* settlement resolves this liability for the signatories of the *de minimis* settlement. The *de minimis* PRPs' potential liability associated with the PCBs does not represent the majority of the total site costs. The objective of U.S. EPA in this settlement is to resolve *de minimis* parties' liability as completely as possible. While certain parties may question their liability for the PCB contamination, the overall potential liability presents a real litigation risk to *de minimis* parties, which is resolved by this *de minimis* settlement.

6. Comment

There is no basis for contending that there is presently an imminent and substantial endangerment at the Site because the Site was cleaned up many years ago by some of the PRPs and returned to EPA control. (Comment submitted by the joint commenting parties).

U.S. EPA's Response

Following the significant, but limited response activities conducted at the Site by U.S. EPA and some of the non-*de minimis* PRPs, respectively, U.S. EPA conducted a site assessment at the CCCI Site in 1994 that documented conditions at the site that presented an imminent and substantial endangerment. The Agency found, inter alia, deteriorating tanks containing acids, solvents, and acid and caustic residue; deteriorating drums containing acid, caustic and flammable liquids, and cyanide solids; soil contaminated with acid wastes and chromium; PCB-contaminated soil; and contaminated groundwater. U.S. EPA determined that these and other conditions at the Site presented the actual or potential exposure to nearby populations, animals, or the food chain from hazardous substances, pollutants, or contaminants; the threat of release from hazardous substances, pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers; the threat of fire or explosion; and the threat of release from hazardous substances, pollutants or contaminants, caused by weather conditions at the Site. Accordingly, the Agency determined that conditions at the Site constituted an imminent and substantial endangerment to public health, welfare and the environment, consistent with 40 C.F.R. § 300.415(b)(1), notwithstanding earlier response activities conducted at the Site.

7. **Comment**

U.S. EPA did not consider the commenting party's November 1994 argument and supporting documentation that it had generated a commercial product (ferric chloride) that was sold to CCCI and transported by CCCI trucks, and, therefore, was not responsible for the disposal of hazardous waste at the CCCI Site. Thus, the volumetric ranking used in the *de minimis* settlement is in error. (Comment submitted by KAS Chemicals).

U.S. EPA's Response

It is U.S. EPA's position that the current volumetric ranking is appropriate, given its previous evaluation of the commenting party's earlier argument regarding its liability at the Site. In November 1994, the commenting party submitted a letter to U.S. EPA, arguing that it had generated a commercial product, ferric chloride, that had been sold to CCCI. In support of this claim, the commenting party attached a September 28, 1990 memorandum that had been filed earlier in connection with a private contribution action. This memorandum attached and relied heavily on a September 26, 1990 affidavit of the Site owner/operator. The Agency reviewed the memorandum and affidavit, but found the affidavit to be self-serving, equivocal, and not entirely credible and/or persuasive. Although the memorandum also attached several documents that showed that it had an arrangement with CCCI to provide CCCI with ferric chloride, this documentation did not prove that the commenting party's ferric chloride was a commercial product. See United States v. Pesses, 794 F. Supp. 151, 156 (W.D. Pa. 1992) (direction of flow of monetary consideration is not the test of liability under CERCLA; relevant inquiry is who decided to place the waste in the hands of the facility), citing, U.S. v. Conservation Chemical, 619 F. Supp. 162, 240 (W.D. Mo. 1985); U.S. v. Ward, 618 F. Supp. 884, 895 (E.D. N.C. 1985) (CERCLA liability cannot be avoided by the mere characterization of a transaction as a sale); U.S. v. A & F Materials Co., Inc., 582 F. Supp. 842, 845 (S.D. Ill. 1984) (CERCLA enacted to insure that considerations far weightier than price determine liability for disposal of hazardous waste). Accordingly, the Agency informed the commenting party in March 1995 that its argument for a consumer product exemption was not supported by the evidence. The commenting party's latest

reiteration of its earlier argument regarding its liability at the Site does not alter EPA's earlier determination regarding the nature of the commenting party's wastes sent to the Site, and does not affect the *de minimis* settlement. Moreover, the commenting party's argument regarding its own liability at this Site would not affect the majority of the 152 settling *de minimis* PRPs that are participating in this settlement. Therefore, it would not be fair or appropriate for the Agency to withdraw or withhold the *de minimis* settlement.

8. **Comment**

U.S. EPA did not consider the commenting party's November 1994 argument that the ferric chloride transported from its facility was never unloaded or otherwise handled at the Site, and, therefore, the commenting party was not responsible for the disposal of hazardous waste at the CCCI Site. Thus, the volumetric ranking is in error. (Comment submitted by KAS Chemicals).

U.S. EPA's Response

The Agency previously considered the commenting party's argument, but found that the claim was not supported by the evidence. In November 1994, the commenting party submitted a letter to U.S. EPA, arguing that its shipments of ferric chloride had bypassed the Site. In support of this claim, the commenting party attached a September 28, 1990 memorandum that it had filed in connection with a private contribution action. This memorandum attached and relied heavily on the September 26, 1990 affidavit of the Site owner/operator. The Agency reviewed the memorandum and affidavit, but found the affidavit to be self-serving, equivocal, and not entirely credible and/or persuasive. Accordingly, the Agency informed the commenting party in March 1995 that its argument that the waste had "bypassed" the Site was not supported by the evidence.

On July 12, 1996, well over a year after the Agency's 1995 response to the commenting party, and at least five months after the Agency made a formal *de minimis* offer to the *de minimis* PRPs, the commenting party resurrected its November 1994 argument to the Agency and submitted "paired" incoming and outgoing bills of lading in support of its claim that some of its waste had "bypassed" the Site. It is the Agency's position that it would

not be fair to the 152 settling *de minimis* PRPs to withdraw the *de minimis* settlement to evaluate the commenting party's latest submittal of documents. The Agency gave all of the PRPs at this Site, including the commenting party, ample opportunity to present challenges to the initial volumetric ranking. The Agency subsequently received and evaluated a number of PRP liability challenges, including the one submitted by the commenting party in November 1994. All PRP challenges to liability that were supported by credible evidence resulted in an adjustment of the volumetric ranking. The Agency made a good faith *de minimis* settlement offer on February 8, 1996, based on a volumetric ranking that had been adjusted to account for errors that were proven by credible evidence.[2] It would have been unreasonable for U.S. EPA to withhold making a *de minimis* settlement offer in this case because of the mere possibility that the commenting party or any other PRP that was dissatisfied with the Agency's decision on its liability challenge, would submit additional documentation at some undetermined future point in time. In addition, fairness to the settling *de minimis* parties who have spent considerable time, effort and monies negotiating the settlement with the Agency over a number of months, dictates that the Agency not withdraw the *de minimis* settlement offer because the commenting party has submitted additional information at this late date.[3] Moreover, the commenting party's argument regarding

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[2]Notwithstanding the Agency's significant efforts in this case to evaluate the PRPs' liability concerns and correct errors in the volumetric ranking, U.S. EPA recognizes that the volumetric rankings used for *de minimis* settlements need not contain precise figures and need only reflect the Region's understanding of the waste present at the site. See Streamlined Approach for Settlements with *De minimis* Waste Contributors under CERCLA Section 122(g)(1)(A), OSWER Directive #9834.7-1D (July 30, 1993).

[3]It is the Agency's position that the commenting party's additional documentation submitted on July 12, 1996, is not subject to U.S. EPA review within the context of this *de minimis* settlement. If necessary, however, the Agency may examine this documentation during the next phase of activity at the Site that will involve the non-*de minimis* PRPs.

its own liability at this Site would not affect the majority of the 152 settling *de minimis* PRPs that are participating in this settlement; therefore, it would not be fair or appropriate for the Agency to withdraw or withhold the *de minimis* settlement for this Site.

9. **Comment**

U.S. EPA labeled out-going bills of lading showing materials being shipped from the CCCI Site to other destinations as non-transactional and did not produce the outgoing records unless specifically requested. (Comment submitted by KAS Chemicals).

U.S. EPA's Response

The Agency labeled the out-going bills of lading as non-transactional, but informed the parties of their existence, and never denied any party access to the information. Indeed, a number of PRPs, including, but not limited to the 90-member *de minimis* group (through common counsel), as well as the commenting party, examined these files and copied all or some of them for further evaluation. The Agency's handling of these files did not adversely affect the *de minimis* settlement or the ability of the *de minimis* and *non-de minimis* PRPs to get information.

10. **Comment**

The commenting party did not receive a copy of the draft settlement document that was sent to Mr. Lake in March 1995, and first heard of the *de minimis* order in February 1996. (Comment submitted by KAS Chemicals).

U.S. EPA's Response

In March 1995, U.S. EPA sent a draft ***non-de minimis*** settlement document to a known group of non-*de minimis* PRPs, through its chairman, Clifton Lake. Mr. Lake's March 2, 1995 letter, that contained significant comments on the concept of a *de minimis* settlement for the Site, was "response" to the draft ***non-de minimis*** document. No draft *de minimis* document was sent to the non-*de minimis* PRPs. The Agency, however, sent a courtesy copy of the formal *de minimis* settlement offer to all of the non-*de minimis* PRPs, including the commenting party, on February 14,

1996, after the initial *de minimis* settlement offers had been sent to the *de minimis* PRPs. Therefore, while it is unfortunate that the commenting party did not receive a copy of the ***non-de minimis*** draft document because it was not a part of the group chaired by Mr. Lake, the commenting party was not disadvantaged, vis-a-vis the other non-*de minimis* PRPs, in its ability to assess the *de minimis* settlement in this case.